

tween a jury trial and preservation of the lien becomes moot, since the plaintiff does not need this security for his judgment. This may explain why the courts have never relied on this reasoning to support the rule of the *Toby* and *Baun* cases.

If, for some reason, the plaintiff should complain of the election which, by the *Burns* rule he would be required to make, the result, while one involving policy considerations not simple to resolve, should nevertheless be clear. Given that there is no question of the *Constitutional right* to a jury trial in these cases,<sup>42</sup> the policy of res judicata should weigh more heavily. If this were not the case, common law courts should refuse to accord res judicata effect to decrees of equity or admiralty courts generally in cases where the plaintiff could have sought his relief either at law or in one of these other courts.

On the whole there does not seem to be sufficient strength in the established rule to support it in light of the advantages which will accrue by the application of res judicata as in the *Burns* case.

<sup>42</sup> The right to a jury trial is given only in actions at law. The plaintiff who elects to proceed in admiralty in order to secure advantages to himself not available at law cannot be heard to complain that he has been deprived of trial by jury.

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### WORK-ASSIGNMENT DISPUTES UNDER THE RAILWAY LABOR ACT

Work-assignment disputes arise in the railroad industry when each of two unions claims that its collective agreement with a carrier entitles it to a particular job. The highly fragmented craft structure<sup>1</sup> of the industry results in overlapping interests and a jealous guarding of position by each craft group against the inroads of others. When technological or other changes increase or reduce the available jobs, each union seeks to secure or preserve assignments for its members.<sup>2</sup> This comment will deal with the issue of whether the resulting disputes are to be settled within the framework of the existing collective agreements or by renegotiation of these agreements. This issue arises largely from the unique features of both the tribunal provided by the Railway Labor Act for adjusting controversies growing out of the interpretation or application of collective agreements and the collective agreements involved.

<sup>1</sup> All attempts at industrial unionism in the railroad industry have failed, in part because of the hostility of existing unions toward potential rivals.

<sup>2</sup> See KAUFMAN, *COLLECTIVE BARGAINING IN THE RAILROAD INDUSTRY* 45, 147 (1954); Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 *YALE L.J.* 567, 590-91 (1937).

## I

The Railway Labor Act (RLA) of 1934<sup>3</sup> is designed to reduce industrial unrest on the rails<sup>4</sup> by providing agencies for the mediation and adjustment of disputes.<sup>5</sup> The National Railroad Adjustment Board (NRAB), an agency composed half of representatives chosen and compensated by the carriers and half of representatives chosen and compensated by the railroad brotherhoods,<sup>6</sup> is empowered to make awards in disputes between "an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working condition conditions."<sup>7</sup> Work-assignment disputes usually are presented initially to the NRAB when the union whose claims for the disputed work has been denied initiates a proceeding against the carrier seeking favorable interpretation and application of the terms of its agreement.

Proceedings are initiated by the filing of submissions<sup>8</sup> with the division of the NRAB which has jurisdiction over the craft of employees involved in the dispute.<sup>9</sup> Section 3 first (j) of the RLA provides that the several divisions of the

<sup>3</sup> 48 Stat. 926 (1934), as amended, 45 U.S.C.A. §§ 151-188 (1958).

<sup>4</sup> Section 201 of the RLA, 49 Stat. 1189 (1936), 45 U.S.C. § 181 (1958), extends coverage to common carriers by air engaged in interstate or foreign commerce. A precursor of a possible work-assignment dispute developed in collective bargaining negotiations between the major airlines, the Air Lines Pilots Association (ALPA), and the Flight Engineers Association (FEA) during the winter of 1958-59. Civil Aeronautics Board Regulations require a flight engineer in addition to a pilot and a co-pilot in the case of jet airliners. ALPA contended that the flight engineers on the jets should have pilot training as a safety measure. FEA objected, fearing that pilot training for its members would lead to ALPA's assertion of jurisdiction over the coveted "third man in the cockpit." In rather Solomon-like fashion the difficulties were resolved by the addition of a fourth man, a junior pilot, to the crew, thereby satisfying, at least temporarily, the interests of both unions. See discussion of the bargaining negotiations in 43 LAB. REL. REP. 228, 231 (1959).

<sup>5</sup> The Act's purpose is to "provide for the prompt and orderly settlement of all disputes," in order to "avoid an interruption to commerce or to the operation of any carrier." § 151a. This may be contrasted with the National Labor Relations Act, 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 141 *et seq.* (1958), which attempts to minimize industrial strife by protecting employees' rights of self-organization and collective bargaining and by proscribing certain "unfair labor practices." For an early comparison of the two statutes see Byrer, *The Railway Labor Act and the National Labor Relations Act—A Comparison*, 44 W. VA. L.Q. 1 (1937).

<sup>6</sup> 45 U.S.C. § 153 first(a), (g) (1958).

<sup>7</sup> *Id.* first(i).

<sup>8</sup> A submission is a combined complaint and brief, in which both the factual basis of the dispute and the arguments and precedents supporting the party's claim are set forth. Although the statute provides that disputes may be referred jointly by the parties or by either party, § 153 first(i), submissions are almost always filed by the employee or the union.

<sup>9</sup> The first division has jurisdiction over train and yard services. The second division covers shop-craft employees; while the third division handles disputes of station, tower and telegraph employees, clerical, store and freight employees, dining car employees and sleeping car porters. The fourth division covers maritime employees and all others not covered by the first three divisions. § 153 first(h). The Board as a whole is merely a fiscal unit, with the power of adjustment vested in the divisions, which operate independently of each other.

Board "shall give due notice of all hearings to the employee or employees and the carrier or carriers *involved* in any dispute submitted to them."<sup>10</sup> The initial difficulty in a work-assignment dispute centers around the meaning of the word "involved." The carrier members of the NRAB and the carriers contend that the rights of a craft or class of employees represented by the non-submitting union, which has claimed the disputed work on behalf of its members or which has been awarded the work by the carriers, are affected by the proceeding, and that it is, therefore, "involved" in the dispute and entitled to notice.<sup>11</sup> As a practical matter the carriers position is based on the threat of possible dual liability. If the Board fails to bring the two contending unions before it in a consolidated proceeding, the non-submitting union is free to secure an award of the disputed work in an independent Board proceeding.<sup>12</sup> To avoid the risk of double liability due to independent awards of the same job to both unions, the carriers contend that notice should be given to the non-submitting union so that it will be bound by the initial award. Essentially, the carriers' position assumes that all work-assignment disputes can and should be settled by an integrated interpretation of both existing agreements.

The labor members of the Board, and the unions, on the other hand, contend that only the petitioning union and the respondent carrier are "involved" in a dispute so as to be entitled to notice and an opportunity to be heard. Contending that the Board's function is limited to interpretation or application of existing agreements, they insist that the Board has no authority to resolve conflicts between the agreements of two unions. From the unions' premise that collective agreements are not necessarily mutually exclusive, it follows that when the Board considers the agreement of the submitting union its award decides only whether that union has contracted for the disputed work. The decision does not affect the rights of the other union, which may also be entitled to the work by the provisions of its agreement. If the carrier has contracted the work to both unions, and they have secured favorable awards in independent proceedings, the carrier must renegotiate, by conference, its agreements to remove its double liability, and, if the parties fail to agree, by resort to the services of the National Mediation Board.<sup>13</sup> If the NRAB dealt simultaneously with both agreements, the labor members contend, it in effect would be rewrit-

<sup>10</sup> Section 153 first(j).

<sup>11</sup> *E.g.*, Carrier dissent, Award 1628, 15 Awards Second Div. 1391 (1953); Award 1730, 16 Awards Second Div. 267 (1953); Award 5432, 52 Awards Third Div. 465 (1951).

<sup>12</sup> See *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366 (1955); *Order of Railroad Telegraphers v. New Orleans, T. & M. Ry.*, 156 F.2d 1, (8th Cir. 1956), *cert. denied*, 329 U.S. 758 (1946).

<sup>13</sup> The National Mediation Board, a three member agency appointed by the President, provides mediation and arbitration services in disputes involving changes in rates of pay, rules, or working conditions. 45 U.S.C. §§ 155, 175 (1958).

ing agreements for the parties, infringing on the bargaining process, and exceeding its statutory authority.<sup>14</sup>

These opposing positions are highlighted by deadlocks, resulting from bloc voting by the partisan Board members, on the question of whether notice should be given to the non-submitting union. The RLA provides for the appointment of independent neutral referees to resolve deadlocks resulting from the "failure of any division to agree upon an award."<sup>15</sup> Although in recent years many of these procedural deadlocks have been submitted to referees,<sup>16</sup> the question of notice has not been satisfactorily resolved. Referees are selected by the division or by the National Mediation Board if the division members fail to agree on them.<sup>17</sup> Each referee is called in to decide only a selected group of accumulated deadlocked cases; and he may be blacklisted from service if his decisions offend unions or carriers.<sup>18</sup> Since referees have not always felt themselves bound by the decisions of their predecessors, awards with referee participation have been inconsistent. It is not uncommon to find several awards, decided within a short time in the same division, going both ways on the question of notice and paying little or no attention to the inconsistent decisions.<sup>19</sup>

<sup>14</sup> *E.g.*, Brief for Petitioners, pp. 27-35, Brief for Amici Curiae pp. 4-21, *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366 (1955); Award 1628, 15 Awards Second Div. 391, 398 (1953) ("[claimant's] rights are dependent upon the interpretation of his own agreement unaffected by any award made under some other contract. . . . [A] carrier may in some instances contract the same work to two or more crafts. Until such time as it sees fit to eliminate the duplication under the processes provided by section 6, it may find itself subject to two or more liabilities, the same as any person may do by contracting with more than one person concerning the identical subject matter."); Award 5702, 55 Awards Third Div. 4 (1952).

<sup>15</sup> 45 U.S.C. § 153 first(1) (1958). Deadlocks occur frequently, not only on the notice question, but on substantive issues. In 1937 it was estimated that referees were required to break deadlocks in about one-third of the cases presented to the Board, while by the 1950's the divisions deadlocked and called in referees in about four-fifth of the cases. Daugherty, *Arbitration by the National Railroad Adjustment Board*, in *ARBITRATION TODAY, PROCEEDINGS OF THE EIGHTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS* 93, at 101 (1955).

<sup>16</sup> *Id.* at 7. Prior to about 1950, section 153 first(1) was read to provide for the appointment of referees only where the Board deadlocked on the merits of a dispute. Procedural deadlocks on the question of notice were not submitted to referees, and when such deadlocks occurred the division did not give notice but proceeded to decision with only the parties to the submission before it. It is probable that the present submission of procedural deadlocks to referees stems from the court decisions voiding awards rendered without notice. See cases cited notes 24, 25 *infra*.

<sup>17</sup> 45 U.S.C. § 153 first(1) (1958).

<sup>18</sup> Daugherty, *op. cit. supra* note 15, at 102, 109.

<sup>19</sup> *E.g.*, Award 1523, 14 Awards Second Div. 272 (1952) (notice to non-submitting union held necessary before decision on the merits); Award 1628, 15 Awards Second Div. 1391 (1953) (notice to non-submitting union held unnecessary to decision for claimant on the merits); Award 1835, 17 Awards Second Div. 395 (1954) (non-submitting union held to be a proper but not a necessary party, so that in its absence decision against claimant on the merits was proper).

Garrison, writing in 1937, *The National Railroad Adjustment Board: A Unique Administrative Agency*, *supra* note 2, at 583, suggested that the divisions were building up their own com-

When the Board fails to give notice it may proceed to a decision solely on the basis of the submitting union's collective agreement. If the union prevails, the denial of notice to the non-submitting union may be subjected to judicial scrutiny in several ways. If the carrier does not comply with the award, the submitting union may seek enforcement in a federal district court.<sup>20</sup> The non-submitting union may attempt to enjoin enforcement of the award;<sup>21</sup> if both unions have secured independent awards in their favor, the carrier may petition to enjoin enforcement of both awards.<sup>22</sup>

## II

Faced with the question of whether notice should have been given to the non-submitting union, the district courts and the courts of appeals have rigorously adhered to the carriers' position. When the non-submitting union has sought to enjoin enforcement of the award, the courts, with one exception,<sup>23</sup>

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mon law and that the members treated precedent with seriousness and skill. This optimistic prediction of the development of a consistent body of precedent has failed to materialize, due in part perhaps to the increased use of referees, see note 16 *supra*. Suggestions have been made for amending the RLA to provide for full-time neutral referees, Garrison, *supra* note 2, at 595; or for making the NRAB a non-partisan tribunal. Comment, *Railroad Labor Disputes and the National Railroad Adjustment Board*, 18 U. CHI. L. REV. 303, 321 (1951).

<sup>20</sup> Order of Railroad Telegraphers v. New Orleans, T. & M. Ry., 229 F.2d 59 (8th Cir. 1956), *cert. denied*, 350 U.S. 997 (1956) (both unions had been successful in independent Board proceedings); Kirby v. Pennsylvania R.R., 188 F.2d 793 (3d Cir. 1951). General judicial review of NRAB awards is not available. 45 U.S.C. § 153 first (p) limits judicial review to actions brought by the claimant, or by any person for whose benefit an award was rendered, for enforcement of the award against the carrier.

<sup>21</sup> Allain v. Tummon, 212 F.2d 32 (7th Cir. 1954); Hunter v. Atcheson, T. & S. F. Ry., 188 F.2d 294 (7th Cir. 1951); Brotherhood of Railroad Trainmen v. Templeton, 181 F.2d 527, (8th Cir. 1950), *cert. denied*, 340 U.S. 823 (1950); Hunter v. Atcheson, T. & S. F. Ry. 171 F.2d 594 (7th Cir. 1948), *cert. denied*, 337 U.S. 916 (1948); Order of Railroad Telegraphers v. New Orleans, T. & M. Ry., 156 F.2d 1 (8th Cir. 1946), *cert. denied*, 329 U.S. 758 (1946); Sadler v. Union R.R., 123 F. Supp. 625 (W.D. Pa. 1954) (award of Special Board created by the parties).

<sup>22</sup> Missouri-K-T R.R. v. Brotherhood of Ry. & S.S. Clerks, 188 F.2d 302 (7th Cir. 1951); Seaboard Airlines R.R. v. Castle, 170 F. Supp. 327 (N.D. Ill. 1958); Union R.R. v. NRAB, 170 F. Supp. 281 (N.D. Ill. 1958); Missouri-K-T R.R., 128 F. Supp. 331 (N.D. Ill. 1954). The courts entertain actions by the nonsubmitting union or the carrier, despite § 153 first(p), see note 20 *supra*, on the ground that the granting of relief does not involve the merits of the award.

<sup>23</sup> Order of Railroad Telegraphers v. New Orleans, T. & M. Ry., 156 F.2d 1 (8th Cir. 1946), *cert. denied*, 329 U.S. 758 (1946). The court declared that plaintiff was properly not made a party to the proceeding resulting in the challenged award, that the NRAB had no authority to pass on disputes between crafts, and that such disputes must be resolved by resort to conference or to the National Mediation Board. Relying on Order of Railway Conductors v. Pitney, 326 U.S. 561 (1946), see note 38 *infra*, the Court of Appeals instructed the trial court to stay decision until plaintiff applied for and secured a Board interpretation of its agreement, at which time it could be determined whether intervention of a court of equity was necessary. Impliedly, no judicial relief would be necessary if plaintiff were unsuccessful before the Board. Unlike the situation in *Pitney*, where plaintiff union sought to enjoin the carrier from changing agreements without following the statutory procedure, if plaintiff secured favorable award

have granted the injunction holding either that the award is void as not in conformity with Section 3 first (j) since the plaintiff is "involved" in the dispute and, thus, entitled to notice; or that the award without notice to the plaintiff violates due process.<sup>24</sup> Where the carrier has raised the issue of notice, either as a defense in an enforcement action or in a suit for an injunction, it has prevailed on the same grounds; awards have also been held unenforceable on the grounds either that the non-submitting union is an indispensable party to enforcement by the court or that the carrier is or may be faced with dual awards.<sup>25</sup>

under the rationale of the court it could not enjoin enforcement of the other union's award, as originally prayed for. It appears that plaintiff's only recourse then would have been to secure enforcement of its own award, thus remitting the parties to renegotiation to change their agreements.

This decision seems to have been overruled. In *Brotherhood of Railroad Trainmen v. Templeton*, 181 F.2d 527 (8th Cir. 1950), *cert. denied*, 340 U.S. 823 (1950), the court enjoined enforcement of an NRAB award in favor of the BRT on due process grounds, at the instance of the employees who had been denied notice and an opportunity to participate in the BRT proceedings and had brought no proceedings of their own.

And in *Order of Railroad Telegraphers v. New Orleans, T. & M. Ry.*, 229 F.2d 59 (8th Cir. 1956), *cert. denied*, 350 U.S. 997 (1956), the court held an ORT award unenforceable on the grounds that the non-submitting union was an indispensable party to an enforcement action against the carrier where both unions had secured awards in independent proceedings. The first ORT decision was distinguished on the ground that the suit had been premature since the plaintiff had not filed a claim with the Board. *Cf. Whitehouse v. Illinois Central R.R.*, 349 U.S. 366 (1955). If the court's distinguishing of the first ORT action were valid, then the suit in *Templeton* should have been dismissed on the ground that it was premature.

<sup>24</sup> *Brotherhood of Railroad Trainmen v. Templeton*, 181 F.2d 527 (8th Cir. 1950), *cert. denied*, 340 U.S. 823 (1950); *Hunter v. Atchison, T. & S. F. Ry.*, 171 F.2d 594 (7th Cir. 1948), *cert. denied*, 337 U.S. 916 (1948); *Sadler v. Union R.R.*, 123 F. Supp. 625 (W.D. Pa., 1954).

In the *Hunter* and *Sadler* cases reliance was placed on decisions voiding, on due process grounds, awards concerned with promotion and seniority and involving the interpretation of a single collective agreement. *Nord v. Griffin*, 86 F.2d 481 (7th Cir. 1936); *Brand v. Pennsylvania R.R.*, 22 F. Supp. 569 (E.D. Pa. 1938); see *Estes v. Union Terminal Co.*, 89 F.2d 768 (5th Cir. 1937).

Such a result may have been appropriate in the 1930's on the ground that the displaced employees could not have secured awards in independent proceedings since all rights depended on the interpretation of a single collective agreement. Thus, the NRAB's award effectively deprived them of seniority rights without notice or hearing.

But in *Elgin J. & E. Ry. v. Burley*, 325 U.S. 711 (1945), the Supreme Court held that an award is ineffective against an employee unless he is represented individually in the NRAB proceeding in accordance with the rights of representation conferred by the RLA. This would appear to prevent the foreclosure of the displaced employees' rights as they would no longer be bound by an adverse award if they were not represented. Therefore, the due process rationale appears inapplicable in the seniority cases as well as the work-assignment disputes.

<sup>25</sup> *Order of Railroad Telegraphers v. New Orleans, T. & M. Ry.*, 229 F.2d 59 (8th Cir. 1956), *cert. denied*, 350 U.S. 997 (1956); *Missouri-K-T R.R. v. NRAB*, 128 F.Supp. 331 (N.D. Ill. 1954) (held: in failing to give notice to the non-submitting union, the carrier was deprived of due process); see *Kirby v. Pennsylvania R.R.*, 188 F.2d 793 (3d Cir. 1951); *Brotherhood of Ry. & S.S. Clerks v. Pennsylvania R.R.*, 107 F.Supp. 924 (W.D. Pa. 1952). But *cf. Union R.R. v. NRAB*, 170 F.Supp. 281 (N.D. Ill. 1958).

When two awards have been voided a few cases have directed the NRAB to reopen proceedings and consolidate the actions. *Brotherhood of Railroad Trainmen v. Swan*, 214 F.2d 56 (7th Cir. 1954); *Missouri-K-T R.R. v. Brotherhood of R. & S.S. Clerks*, 188 F.2d 302 (7th Cir. 1951).

In *Whitehouse v. Ill. Central R.R.*, the Supreme Court<sup>26</sup> cast doubt on the soundness of the decisions which had adopted the carriers' position. The telegraphers' union had submitted its claim to the NRAB, which, despite an objection by the carrier, refused to serve notice on the clerks' union. After the clerks threatened prosecution of a similar claim and before the Board had announced its decision on the telegraphers' claim, the carrier, anticipating dual awards, petitioned the district court to enjoin disposition of the claim until the clerks were notified. The Supreme Court held that no relief was available prior to a decision on the merits of the first claim by the Board. Failure to give notice, declared Mr. Justice Frankfurter, might be harmless error if the Board's decision in the telegraphers' proceeding were in favor of the carrier since the carrier then could grant the work to the clerks without fear of double liability. In addition, the granting of relief at this stage would disrupt the proceedings of the Board.

Although the Court did not reach the merits of the notice question, which it had been urged to resolve, Mr. Justice Frankfurter declared:

The working of the notice provision . . . does not give a clear answer. In the context of other related provisions [of the Railway Labor Act] it is certainly not obvious that in a situation like that now before us notice need be given beyond the parties to the submission. Analogy to the law of parties as developed for judicial proceedings is not compelling and in any event does not approach constitutional magnitude.<sup>27</sup>

The dictum indicates the error in the lower courts' invalidating awards on due process grounds. An award in favor of the submitting union is not binding on the non-submitting union since it may initiate an independent proceeding which may result in a favorable interpretation of its contract despite the fact that the Board has previously rendered an award in favor of the other union.<sup>28</sup> Similarly, since interests of the non-submitting union are not directly affected by a proceeding to which it is not made a party, the application of the "indispensable party" label seems inappropriate.<sup>29</sup> And the intimation in *Whitehouse* that the RLA may provide adequate remedies for the carrier's dual liability dilemma other than the NRAB proceedings appears to refer to the unions' argument that dual awards arise out of situations which can be dealt with only by the bargaining process.

The *Whitehouse* dictum, although urged in subsequent cases, has not been followed.<sup>30</sup> The courts seem committed to the carriers' position, and the Board

<sup>26</sup> 349 U.S. 366 (1955).

<sup>27</sup> *Id.* at 370-71.

<sup>28</sup> See note 24 *supra*.

<sup>29</sup> But see Comment, *Enforcement of Railway Adjustment Board Orders—Notice to Third Parties*, 9 STAN. L. REV. 820 (1957), where it is suggested that dismissal of suits to enforce Board orders is proper unless the non-submitting union is a party to the enforcement suit.

<sup>30</sup> *Order of Railroad Telegraphers v. New Orleans, T. & M. Ry.*, 229 F.2d 59 (8th Cir. 1956) *cert. denied*, 350 U.S. 997 (1956); *Seaboard Airlines R.R. v. Castle*, 170 F.Supp. 327 (N.D. Ill. 1958); *Union R.R. v. NRAB*, 170 F.Supp. 281 (N.D. Ill. 1958).

will probably continue to restrict notice to the parties to the submission in a large number of cases due to the inaction resulting from partisan deadlocks. As the language of section 3 first(j) provides no clear answer, an inquiry into the merits of the respective positions in light of the nature of the collective agreements involved in work-assignment disputes is in order.

### III

Work-assignment disputes largely result from the vague and ambiguous language used in the collective agreements. In most disputes, both unions claim that the general scope rules in their agreements with the carrier entitle them to the same job.<sup>31</sup> In a few disputes however one union contends that it has a specific contract provision assigning it the disputed work, and the other union bases its claim on its scope rule.<sup>32</sup> The scope rule incorporates the customary work assignments existing at the time of contracting and provides a broad outline for allocating new or changed job assignments on the basis of analogy to the existing custom and usage. Since it does not define peripheral areas of craft coverage with precision, the scope rule may often be read literally to cover the disputed work. When a dispute arises, therefore, a union basing its claim on its scope rule will rely on that rule's literal language and supporting custom and analogy.

The importance of custom and usage in construing agreements gives rise to difficulties. What one union may consider a "customary" assignment may result only from the temporary acquiescence of a rival group. The rival may withdraw this acquiescence and assert a claim to the work as other aspects of the general work assignment pattern change. Custom may also be changed, directly or indirectly, by new collective agreements. When the dispute involves a job which

<sup>31</sup> *E.g.*, Award 1359, 12 Awards Second Div. 512 (1950). Sheet metal workers claimed the work of assembling and erecting units of sheet metal for housing signal instruments under their agreement's scope rule covering "building, erecting [and] assembling . . . parts made of galvanized iron . . . and all other work generally recognized as sheet metal workers work." The signalmen, to whom the carrier had assigned the work, had a scope rule covering "construction of signal systems with all appurtenances."

See also Award 1835, 17 Awards Second Div. 395 (1954); Award 1640, 15 Awards Second Div. 494 (1953); Award 1523, 14 Awards Second Div. 272 (1952); involving a three-cornered dispute between electricians, machinists, and signalmen for the job of maintaining the electrical and mechanical equipment of car retarders used in the signal system.

<sup>32</sup> *E.g.*, *Order of Railroad Conductors v. Pitney*, 326 U.S. 561 (1946). The disputed work assignment involved the operation of five trains *inside* the railroad yards. Members of the Order of Railroad Conductors (ORC) had generally operated trains outside the yards, while Brotherhood of Railroad Trainmen (BRT) members had operated those inside the yards, although in practice this had been varied in relation to specific jobs, and ORC men had operated the five inside trains in question for some thirty-five years. The carrier and ORC entered into an agreement giving ORC exclusive assignments to the outside trains, but ORC continued to operate the five inside trains until BRT protested and secured an agreement assigning it the work. Essentially then, BRT claimed the work under a specific provision of its agreement while ORC claimed that its agreement, while not specifically covering the job, incorporated the prevailing custom which it had not bargained away. See discussion of *Pitney* at note 38 *infra*.



was not in existence and assigned at the time of the contracting, each union will seek analogies in the pre-existing work pattern which justify assignment to it. Because of the extensive and often ambiguous custom, each union will probably be able to present plausible analogies.

If the NRAB were to construe each agreement separately, as the unions advocate, it would appear that each union would probably be awarded the disputed job in all but frivolous claims,<sup>33</sup> and renegotiation of agreements would be necessary. Several factors suggest this result. Where two generalized scope rules are involved, each union can cite custom or analogy to support its claim. Resort to the history of the disputed assignment, including all prior agreements concerning it, seems necessary to determine what is in fact customary or what analogies can properly be drawn. But due to the overlapping nature of job assignments, the custom cited by one group is likely to present a quite distorted picture without the custom and analogous assignments upon which the other group might rely. Absent this opposing evidence,<sup>34</sup> the custom cited by the claimant, or the bare words of its scope rule would appear to compel a decision in its favor. Similarly, in the situation where one union claims a job by reason of a specific contract provision it would appear to be entitled to the job. Independent determination of whether the other union is entitled to the same job on the basis of its scope rule is subject to the same difficulties involved in independent consideration of two scope rules.

If, in accord with the unions' position, independent proceedings are likely to result in favorable awards for both unions, it seems at first blush that the unions would advocate direct and immediate renegotiation of agreements in work-assignment disputes, without the time consuming intermediate step of presentation to the NRAB. The unions, however, may consider the intermediate step desirable because favorable NRAB awards might enhance each union's bargaining position in the subsequent negotiations. Although only one union may contract for the disputed work in the renegotiation, the other union can use its favorable award as a lever with which to secure another work-assignment or wrest other desired concessions from the carrier. This technique of using the jealous inter-craft struggle as a means of securing favorable concessions for *both* unions<sup>35</sup> in the negotiation process may explain the unions' reluctance to

<sup>33</sup> *E.g.*, Award 1961, 15 Awards Second Div. 1070 (1953). The electricians' claimed for work which had been assigned to signalmen. Held: notice to signalmen unnecessary. The only ground for the electricians' claim was under the general scope rule. According to the practice at the time the contract was adopted, *cited by the electricians*, the electricians had no right to the work. See Award 523, 14 Awards Second Div. 272 (1952).

<sup>34</sup> It might be contended, however, that the carrier could introduce evidence of the opposing union's customs, analogies, and bargaining history.

<sup>35</sup> This appears to be supported by evidence of agreement among the unions represented on the NRAB that one union will not intervene in the proceedings brought by another union where the divisions do not give notice. See *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366, 372 (1955). The non-submitting union which had threatened to proceed against the carrier if the submitting union were successful joined in an *amicus curiae* brief which asserted that third parties were not entitled to notice.

accept consolidated proceedings and initial NRAB resolution of work-assignment disputes.

In addition to the practical value of forcing resolution of work-assignment disputes by renegotiation, the unions' position is based on the contention that contracted job assignments are not mutually exclusive—that a carrier's contracting for a job with one union does in no way preclude its contracting for the same job with another union. Consequently, consolidated proceedings whereby only one union could be awarded the disputed job through comparison of both collective agreements and all relevant custom would constitute rewriting, rather than construing, of the collective agreements. This position would at first appear irreconcilable with the implications of the carriers' position that all work assignments can and should be resolved by an integrated interpretation of both agreements. The difficulty in reconciling the unions' and carriers' position appears to be based on the fallacious assumption that a consolidated proceeding and integrated interpretation of both unions' agreements requires in all cases that the Board award the disputed job to one and only one union. It is submitted that consolidated proceedings do not necessarily preclude independent treatment of the collective agreements in those cases where such treatment is warranted.

Nevertheless, in a majority of cases arising under two scope rules, if notice to the non-submitting union is required and both unions are before the NRAB in one proceeding, the Board, with referee is likely to find that although the literal language of both scope rules covers the job and although both unions have pertinent customs and analogy; simultaneous consideration of the rules, bargaining history, custom and analogy will indicate that only one union has, in fact, contracted for the work. Although the possibility of infringing on the bargaining process seems to preclude resolution of all disputes by the NRAB, the disrupting and time consuming nature of new contract negotiations<sup>36</sup> suggests that work-assignment disputes should be settled on the basis of existing contracts wherever possible,<sup>37</sup> with renegotiation reserved for major readjustments in work allocation.

Occasionally, after consideration of both scope rules in one proceeding, the Board may conclude that the custom cited by the unions is so ambiguous or that the disputed job is so different from any existing assignment, that it cannot decide that one union has contracted for the disputed work. Since the contract of neither union covers the job, negotiation will be necessary to resolve the

<sup>36</sup> See Award 1523, 14 Awards Second Div. 272 (1952), where a claim was filed by the electricians and machinists against the carrier for a job which the carrier had assigned to the signalmen. The dispute had been mediated without success. The carrier was willing to apportion the work, but the employees were not; the carrier and the claimants were willing to arbitrate, but the signalmen were not. The NRAB, sitting with referee, held that the difficulties of negotiation illustrated in the claim before it necessitated that notice be given to the signalmen.

<sup>37</sup> *Missouri-K-T R.R. v. Brotherhood of R. & S.S. Clerks*, 188 F.2d 302, 306 (7th Cir. 1951).

dispute. Pending negotiation the carrier should have the freedom to assign the work to *either* union without fear of liability.

Where the Board finds that one union has a specific contract provision covering the disputed job, simultaneous consideration of the two unions' claims may compel it to conclude that the carrier, either inadvertently or intentionally,<sup>38</sup> has specifically granted one group work contracted for by the other, as shown by its scope rule and all relevant custom. A Board decision for either union would be correct as to that union but would infringe on the rights of the other union and would place the Board in the position of rewriting that union's agreement to exclude coverage of the disputed work.<sup>39</sup> Since both unions are entitled

<sup>38</sup> It is arguable that carriers intentionally seek to avoid or postpone resolution of difficult bargaining disputes by entering into duplicate contracts, but in view of the unsatisfactory history of Board resolution of work-assignments and the disrupting nature of subsequent renegotiations, it seems likely that the carriers' action is inadvertent.

<sup>39</sup> *Order of Railroad Conductors v. Pitney*, *supra* note 32, which has been cited as authority for the proposition that both unions should be parties to one proceeding which will resolve the dispute. See *Order of Railroad Telegraphers v. New Orleans, T. & M. Ry.*, 229 F.2d 59 (8th Cir. 1956), *cert. denied*, 350 U.S. 997 (1956); *Missouri-K-T R.R. v. Brotherhood of R. & S.S. Clerks*, 188 F.2d 302 (7th Cir. 1951).

*Pitney*, however, does not support such a conclusion. Prior to that case the Supreme Court had construed the RLA provision that disputes "may be referred . . . to the . . . Adjustment Board," 45 U.S.C. § 153 first (i) (1958), as a permissive grant of jurisdiction to the NRAB, with concurrent jurisdiction in the federal courts. *Moore v. Illinois Central R.R.*, 312 U.S. 630 (1941).

In *Pitney* it was held that the courts must defer to the experience of the NRAB in the interpretation of collective agreements and could grant relief only after the Board had been given opportunity to pass on them. The ORC, which claimed the disputed work by reason of its scope rule and custom, brought an action against the carrier's trustee in a federal court, alleging that the carrier, in making a specific agreement for the work with the BRT, had changed ORC's agreement in violation of section 6 of the RLA. ORC sought to enjoin the carrier from displacing its members without following the statutory procedure. The Court declared that to interpret ORC's agreement properly required that it be read in the light of agreements between the carrier and the BRT and in the light of the usage, practice and custom by which the parties sought to support their particular interpretations, thus suggesting that a consolidated proceedings was necessary.

Under the jurisdictional rule in *Pitney*, however, the NRAB was merely to interpret the agreements, with the ultimate relief to be granted by the court. Thus, if the Board found that ORC was *not* entitled to the work, the court would not grant it the relief prayed for, and the carrier would continue to employ the BRT men on the disputed job. If, however, the Board found that ORC was entitled to the work, the court would grant injunctive relief. This would not free the carrier of double liability since BRT would still be entitled to the work, and renegotiation would be needed. It appears that the Court did not envision that complete resolution of the dispute would be accomplished by the Board's proceeding since a favorable interpretation of ORC's agreement would not preclude BRT from asserting rights under its agreement.

This limited view of the Board's function was changed, however, in 1950 when the Supreme Court held that the NRAB had exclusive primary jurisdiction over disputes involving interpretation of collective agreements, and the courts were to grant no relief other than in statutory actions by successful claimants to enforce Board awards. *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 329 (1950). Under the *Slocum* jurisdictional rule, where no subsequent recourse to the courts is available, a consolidated proceeding which "resolves" the dispute would seem to preclude one of the unions from asserting its rights in a separate proceeding.

to the job, renegotiation of agreements is necessary to resolve the dispute although pending renegotiation the carrier should be subject to double liability.

As consolidated proceedings appear desirable in order to determine either that the dispute can be resolved on the basis of the existing agreement or that no such resolution is possible, notice should in all cases be given to the non-submitting union. In view of the ambiguous language of section 3 first (j)<sup>40</sup> such a resolution of work-assignments appears permissible within the existing statute. It is arguable, however, that under these proposals labor members of the Board would press for decisions running in favor of both unions, while carrier members would press for decisions selecting between the two union and this might result in the same sort of deadlock which now exists with respect to the notice question. It would seem, however, that, with some definite clarification of the notice issue and the scope of the Board's authority in work-assignment disputes, both the partisan members and the independent referees would be constrained to render more consistent decisions along the lines suggested. Absent thoroughgoing revision of the structure of the RLA,<sup>41</sup> a more satisfactory solution seems unlikely.

<sup>40</sup> See text at note 10 *supra*.

<sup>41</sup> See Garrison, *supra* note 2, at 595; Comment, *Railroad Labor Disputes and the National Railroad Adjustment Board*, 18 U. CHI. L. REV. 303, 321 (1951).

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### CHANGE OF VENUE: IN REM ACTIONS

The recent admiralty case of *Continental Grain Company v. Federal Barge Lines, Inc.*<sup>1</sup> raised the unusual question of the transferability of a libel in rem under section 1404(a)<sup>2</sup> of the Judicial Code, the general change of venue provision. Claimant Federal Barge Lines moved for a transfer of the libel in rem from the Louisiana district court in which the action had been brought to the Tennessee district in which the sinking complained of had occurred, and in which the claimant was the plaintiff in an in personam action at law, based on the same sinking, against the in rem libelant. The claimant was granted a change of venue, and on appeal<sup>3</sup> the transfer order was affirmed. In upholding the transfer of an in rem action, the Court of Appeals for the Fifth Circuit found it necessary to

<sup>1</sup> 268 F.2d 240 (5th Cir. 1959), *cert. granted*, 361 U.S. 811 (1959).

<sup>2</sup> 28 U.S.C. § 1404(a) (1958): "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

<sup>3</sup> The lower court's decision was reviewed under the new interlocutory appeals act. 28 U.S.C. § 1292(b) (1958). Prior to its enactment 1404(a) transfer orders could only be reviewed by a petition for a writ of mandamus against the district court judge, since they are not final decrees. See, Kaufman, *Further Observations On Transfers Under Section 1404(a)*, 56 COLUM. L. REV. 1-11 (1956).